Nos. 17-1717 and 18-18

IN THE

Supreme Court of the United States

THE AMERICAN LEGION, *ET AL.*, *Petitioners*,

v.

AMERICAN HUMANIST ASS'N, *ET AL.*, *Respondents*.

MARYLAND-NATIONAL CAPITAL PARK & PLANNING COMMISSION, *Petitioner*,

v.

AMERICAN HUMANIST ASS'N, *ET AL.*, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief of the Islam & Religious Freedom Action Team of the Religious Freedom Institute as *amicus curiae* in support of Petitioners

MILES E. COLEMAN, *Counsel of Record*
Nelson Mullins Riley & Scarborough, LLP
miles.coleman@nelsonmullins.com
1320 Main Street, 17th Floor
Columbia, SC 29201
(803) 799-2000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. The Establishment Clause was intended to protect, not inhibit, religious exercise and to accommodate diverse religious beliefs 4

A. The Establishment Clause was meant to encourage religious exercise 4

B. The Establishment Clause was meant to accommodate diverse religious beliefs and expression by giving even-handed treatment to all religious faiths 7

II. The *Lemon* test does not reflect the intent of the Establishment Clause and has an especially exclusionary effect on minority religious believers 10

A. The *Lemon* test does not reflect the protective meaning and understanding of the Establishment Clause 11

B. The *Lemon* test has an especially pernicious and disproportionate effect on minority religions by effectively excluding them from public speech and grounds entirely 14

C. In contrast to the unworkable and ahistorical *Lemon* test, the test suggested by *Van Orden* (and urged by Petitioners) is historically defensible, clearer in its application, and thus more consistent in its results 16

III. Offended observer standing and the resulting "heckler's veto" it permits have a particularly injurious effect on minority religious communities 17

CONCLUSION 22

TABLE OF AUTHORITIES

Cases **Page(s)**

Berger v. *Battaglia*,
779 F.2d 992 (4th Cir. 1985) 20

Cohen v. *California*,
403 U.S. 15 (1971) 20

Colorado Christian Univ. v. *Weaver*,
534 F.3d 1245 (10th Cir. 2008) 7

Doe ex rel. Doe v. *Elmbrook Sch. Dist.*,
687 F.3d 840 (7th Cir. 2012) 12

Felix v. *City of Bloomfield*,
847 F.3d 1214 (10th Cir. 2017) 4

Goldman v. *Weinberger*,
475 U.S. 503 (1986) 9

Good News Club v. *Milford Cent. Sch.*,
533 U.S. 98 (2001) 12, 20

Green v. *Haskell Cnty. Bd. of Comm'rs*,
574 F.3d 1235 (10th Cir. 2009) (Gorsuch,
J., dissenting)..... 12

*Hosanna-Tabor Evangelical Lutheran
Church & Sch.* v. *EEOC*,
565 U.S. 171 (2012) 4, 12

Illinois v. *Board of Educ.*,
333 U.S. 203 (1948) 10

Lamb's Chapel v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) 1

LeBlanc-Sternberg v. *Fletcher*,
67 F.3d 412 (2d Cir. 1995) 19

Lemon v. *Kurtzman*,
403 U.S. 602 (1971) ..... *passim*

Lynch v. *Donnelly*,
465 U.S. 668 (1984) 9, 14

Newdow v. *U.S. Cong.*,
313 F.3d 500 (9th Cir. 2002) 10

Pelphrey v. *Cobb Cnty., Ga.*,
547 F.3d 1263 (11th Cir. 2008) 18

Rosenberger v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) 20

Snyder v. *Phelps*,
562 U.S. 443 (2011) 18

Spencer v. *World Vision Inc.*,
633 F.3d 723 (9th Cir. 2011) 18

Tenafly Eruv Ass'n, Inc. v. *Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) 19

Town of Greece v. *Galloway*,
134 S. Ct. 1811 (2014) ..... *passim*

Utah Highway Patrol Ass'n v. *Am. Atheists, Inc.*, 132 S. Ct. 12 (2011) 11

Van Orden v. *Perry*,
545 U.S. 677 (2005) 12–13, 16

Wallace v. *Jaffrey*,
472 U.S. 38 (1985) 9

Zelman v. *Simmons-Harris*,
536 U.S. 639 (2002) 2

Constitutional Provisions

U.S. CONST., AMEND. I ..... *passim*

Other Authorities

Eric Rassbach, *Town of Greece v. Galloway: The Establishment Clause and the Rediscovery of History*, 2014 CATO S. CT. REV. 71, 91 (2014) 12

George Washington, 6 *The Papers of George Washington, Presidential Series* 285 (D. Twohig ed. 1996) 9

Gerard V. Bradley, *Church-State Relationships in America* 46 (1987) 5

J. David Cassel, *Defending the Cannibals*, 57 CHRISTIAN HISTORY & BIOGRAPHY 12 (1998) 18

John Leland, "The Virginia Chronicle," in *The Writings of the Late Elder John Leland including Some Events in His Life*, by John Leland and L. F. Greene (New York: G.W. Wood, 1845) 8

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003) 9

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992)... 2, 11

Moriah Balingit, *Schoolwork about Islam triggers backlash in Virginia County*, Dec. 18, 2015..... 20

MSMV-TV, *Islamic Center of Murfreesboro Receives 9/11-related threat* (Sept. 6, 2011)..... 19

Northwest Ordinance, Chapter 8, 1 stat. 52 (1789) 5

Philip Hamburger, *Separation of Church and State* (Harvard Univ. Press 2002) 7

Roger Williams, *The Bloudy Tenent of Persecution for Cause of Conscience: Discussed in a Conference between Truth and Peace, Who, in All Tender Affection, Present to the High Court of Parliament (as the Result of Their Discourse) These (among Other Passages) of Highest Consideration*, ed. Richard Groves, First ed. (Macon: Mercer University Press, 2001) 7

Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Though a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153 (1996); 10

Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222 (2003)..... 10

Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178 (2005)..... 18

Richard F. Duncan, *Just Another Brick in the Wall: The Establishment Clause As A Heckler's Veto*, 18 TEX. REV. L. & POL. 255 (2014) 21

Roman P. Storzer and Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 Geo. Mason L. Rev. 929 (2001) 10, 18

Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASHINGTON UNIV. L. QUARTERLY 919 (2004) 10, 14

Thomas Jefferson, "Notes on Religion 1," in *The Works of Thomas Jefferson*, Federal ed., vol. 2 (New York and London: G.P. Putnam's Sons, 1904–05) 8

U.S. Dept. of Veterans Affairs, National Cemetery Administration, *Available Emblems of Belief for Placement on Government Headstones and Markers* 11

INTEREST OF *AMICUS CURIAE*[1]

The Islam and Religious Freedom Action Team ("IRF") of the Religious Freedom Institute amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. To this end, the IRF engages in research, education, and advocacy on core issues like freedom from coercion in religion, equal citizenship for people of diverse faiths, a peaceful response to blasphemy, and opposition to forbidding and penalizing blasphemy and apostasy. The IRF explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both where Muslims are a majority and where they are a minority, and by partnering with the Institute's other teams in advocacy.

Though the facts underlying the instant Petitions for Certiorari do not involve Islamic expression or beliefs, the Fourth Circuit's misapprehension of the Establishment Clause's meaning and effect is of great concern to all faith groups and to minority religions especially. In particular, the IRF fears the Fourth Circuit's reasoning and holding—particularly its reliance on and application of the *Lemon* test and the doctrine of "offended observer" standing—will, if not corrected by this Court, have especially deleterious effects on minority religious faiths.

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[1] The parties' counsel were timely notified of and did not object to the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than the *amicus curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

This Court should grant the Petitions for Certiorari and bring much-needed clarity to its Establishment Clause jurisprudence. Contrary to the holding of the Fourth Circuit below, the textually- and historically-compelled solution to Establishment Clause concerns is not the censorship of religious expression from State speech and grounds, but the encouragement of more diverse religious expression. As *amicus* has discovered in its own experience, the "best solution" for "members of minority religions" to achieve equality is "to request fair treatment of alternative traditions, rather than censorship of more mainstream symbols." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 193 (1992). Thus, as in the speech context, religious equality is best obtained not through religious censorship, but through more opportunities for religious speech.

Unfortunately, the *Lemon* test employed by the court below only censors, it does not encourage. And while this Court has both discarded and undermined *Lemon*, lower courts have not felt free to follow suit. The continued operation of *Lemon*, particularly when applied, as here, in suits brought by offended observers, is to turn the Establishment Clause on its head in a way that has an especially deleterious effect on minority religious groups, namely by effectively excluding them entirely from public recognition and accommodation. This Court should grant the Petitions for Certiorari and pronounce with finality the interment of the *Lemon* test, doing away with a formulation unmoored from the constitutional text and history, and which has had an especially exclusionary effect on minority religious believers. In

addition, this Court should, in the same stroke, rectify the aberration of offended observer standing, which empowers anti-religious hecklers to drag religious expression into court and chill religious speech—and particularly minority religious speech—in the public square.

ARGUMENT

This appeal raises the question of how best a pluralistic society of diverse religious beliefs can arrange its public affairs. There are, broadly speaking, only three alternatives. The first is that one group's religion dominates, to the partial or full exclusion of others, as the established state religion. This is obviously proscribed by the Constitution, largely because the Founders had observed, and thus sought to avoid, the conflict it created in European politics.

The second is to slowly and steadily expunge religious belief from the public square altogether. This was the route chosen by the Fourth Circuit: a route both mapped out and fueled by the ahistorical, misbegotten *Lemon* test, and a route that has led to decades of societal conflict and judicial confusion.

The third way, however, is for the government to treat religion with the "benevolent neutrality" long accorded by this Court, which allows the government to accommodate, respect, and reflect the religious beliefs of its citizens without using coercive power to mandate any citizen's adoption of any religious beliefs. As explained more fully below, this final view is the most faithful to the original meaning of the Constitution, is the most accommodating and even-handed in its treatment of minority religious faiths,

and is most successful in achieving a *modus vivendi*—a way of not only living together but of flourishing.

I. The Establishment Clause was intended to protect, not inhibit, religious exercise and to accommodate diverse religious beliefs.

Plaintiffs' suit and the Fourth Circuit's ruling are premised on the erroneous view that the Establishment Clause is an anti-religion clause that is in tension with the Free Exercise Clause and which mandates complete and total separation between the state and any religious observance or depiction. But as explained below, this conclusion is inconsistent with the text, history, and original understanding of the First Amendment.

A. The Establishment Clause was meant to encourage religious exercise.

As this Court recently stated, the Establishment Clause "must be interpreted by reference to historical practices and understandings." *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014) (internal quotation marks omitted); *accord Hosanna-Tabor* v. *EEOC*, 565 U.S. 171 (2012) (closely examining historical understanding to determine the contours of an Establishment Clause claim); *see also Felix* v. *City of Bloomfield*, 847 F.3d 1214 (10th Cir. 2017) (Kelly, J., joined by Tymkovich, C.J., dissenting) (to "make sense of the Establishment Clause" means that "one must understand . . . the Framers' use of the word 'establishment.'"). The Fourth Circuit's ruling, however, ignores the historic understanding that the Establishment Clause requires the government to accommodate a broad array of religions, so long as the government does not

use its power to coerce citizens to abide by a particular religious belief or observance.

Both before and after the ratification of the Constitution, the disestablishment of religion was not understood to require strict separation between the state and any encouragement or recognition of religious belief. The Northwest Ordinance, for example, enacted for the governance of the western territories in 1787, declared that "religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *See* Northwest Ordinance, Chapter 8, 1 stat. 52 (1789). Likewise, colonial Pennsylvania, New Jersey, and Delaware "were self-consciously nonestablishment from the day they were settled," yet all three "aided, encouraged, and sponsored Christianity, including providing direct material and financial assistance to religious institutions and societies." Gerard V. Bradley, *Church-State Relationships in America* 46 (1987). Virginia similarly aided religious schools even *after* Jefferson and Madison succeeded in disestablishing the state church. *Id.* at 131 ("After a painfully self-conscious disestablishment, the non-establishment home state of Jefferson and Madison aided—through tax exemptions, escheated lands, lottery dispensations, and cash grants—sectarian and nondenominational Protestant schools.").

This pre-ratification view of disestablishment undoubtedly colored the aim and originally understood meaning of the Establishment Clause. In the months and years preceding and immediately following the proposal and ratification of the First Amendment, Congress provided for congressional and military chaplains, and Presidents issued

Thanksgiving proclamations. *Id.* at 97–104. Based on pre- and post-ratification practices, debates, and actions, scholars have explained the Establishment Clause was included in the Constitution *not* to suppress governmental commendation or recognition of religion generally, but rather to enhance religious exercise by prohibiting the establishment of a specific favored religion to the exclusion of others:

> These established churches (Episcopal in the southern states and Congregationalist in most New England states) were established through state laws that, most notably, gave government salaries to ministers on account of their religion. Whereas the religious liberty demanded by most dissenters was a freedom from the laws that created these establishments, the separation of church and state was an old, anticlerical, and, increasingly, anti-ecclesiastical conception of the relationship between church and state. As might be expected, therefore, *separation was not something desired by most religious dissenters or guaranteed by the First Amendment.* Indeed, it was quite distinct from the religious liberty protected in any clause of an American constitution, whether that of the federal government or that of any state.
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> * * *
>
> The religious dissenters who participated in the campaign against establishments and whose claims seem to have affected the wording of the constitutional guarantees

> against establishments made demands for a religious liberty that limited civil government, especially civil legislation, *rather than for a religious liberty conceived as a separation of church and state.*

Philip Hamburger, *Separation of Church and State* 10, 107 (2002) (emphasis added). Stated simply, the Establishment Clause has long been understood to promote and encourage religious exercise so long as the government does not coerce citizens into an officially preferred sectarian belief or observance. The Maryland-National Capital Park & Planning Commission has not done so, and the Fourth Circuit erred by ruling otherwise.

B. The Establishment Clause was meant to accommodate diverse religious beliefs and expression by giving even-handed treatment to all religious faiths.

Even before the founding of the Republic, the American ideal of freedom of conscience was understood to provide particular solicitude to minority religious groups, including Muslims, and to place them on equal footing with other, more populous, religious groups. *See Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (McConnell, J.) ("From the beginning, this nation's conception of religious liberty included, at a minimum, the equal treatment of all religious faiths.").

For example, Roger Williams—the founder of Rhode Island and no stranger to persecution for his unpopular religious views—declared "that no persons, Papists, Jewes, Turkes, or Indians [should] be disturbed at their worship." Roger Williams, *The*

Bloudy Tenent of Persecution for Cause of Conscience: Discussed in a Conference between Truth and Peace, Who, in All Tender Affection, Present to the High Court of Parliament (as the Result of Their Discourse) These (among Other Passages) of Highest Consideration, 156 (Richard Groves, ed., First ed.) (Macon: Mercer University Press, 2001).

Thomas Jefferson likewise adopted the view that "neither Pagan nor Mahomedan nor Jew ought to be excluded from the civil rights of the Commonwealth because of his religion." Thomas Jefferson, "Notes on Religion 1," in *The Works of Thomas Jefferson*, Federal ed., vol. 2 (New York and London: G.P. Putnam's Sons, 1904–05). Similarly, John Leland—the staunch Baptist advocate for religious liberty—opposed religious tests for public office not because he desired a hermetic seal separating the state from religion generally, but because such tests denied official recognition and equal standing to minority religious groups:

> All the good such tests do, is to keep from office the best of men; villains make no scruple of any test. The Virginia Constitution is free from this stain. If a man merits the confidence of his neighbours, in Virginia—let him worship one God, twenty God's [sic], or no God—be he Jew, Turk, Pagan, or Infidel, he is eligible to any office in the state.

John Leland, "The Virginia Chronicle," in *The Writings of the Late Elder John Leland including Some Events in His Life*, by John Leland and L. F. Greene (New York: G.W. Wood, 1845), 106.

The view that disestablishment, at its core, simply prevents the government from coercing religious belief or observance unquestionably shaped the drafting and originally understood meaning of the First Amendment. *See* Part I.A., *supra*; *see also* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131 (2003) ("[T]he key element of establishment" was state "control" of religious groups). Hence President Washington's 1790 promise to the Hebrew Congregation of Newport, Rhode Island, that "the Government of the United States" would treat the congregation even-handedly as a matter of "inherent natural rights." 6 *The Papers of George Washington, Presidential Series* 285 (D. Twohig ed. 1996).

Courts have long recognized that *both* of the First Amendment's religion clauses, acting in harmony with one another, are intended to promote the flourishing of minority religions. *See, e.g.*, *Goldman* v. *Weinberger*, 475 U.S. 503, 524 (1986) (Brennan, J., dissenting) ("A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar."); *Wallace* v. *Jaffrey*, 472 U.S. 38, 52–53 (1985) (noting the First Amendment protects the religious liberty of all Americans including "even the adherent of a non-Christian faith such as Islam or Judiaism"); *Lynch* v. *Donnelly*, 465 U.S. 668, 701 (1984) ("The effect on minority religious groups . . . is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support. It

was precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit."); *Illinois* v. *Board of Educ.*, 333 U.S. 203, 231 (1948) (holding that the protection of minority groups is a crucial goal of the first amendment religion clauses); *Newdow* v. *U.S. Cong.*, 313 F.3d 500, 505 (9th Cir. 2002) ("Just as the foundational principle of the Freedom of Speech Clause in the First Amendment tolerates unpopular and even despised ideas, so does the principle underlying the Establishment Clause protect unpopular and despised minorities from government sponsored religious orthodoxy tied to government services.").[2]

II. The *Lemon* test does not reflect the intent of the Establishment Clause and has an especially exclusionary effect on minority religious believers.

The pending Petitions for Certiorari afford this Court the opportunity to declare with finality that the *Lemon* test is well and truly dead. Long criticized and gradually abandoned, *Lemon's* exclusion of *all* religions from public depictions and pronouncements does not comport with the text or historic understanding of the Establishment Clause, nor is it ideal

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[2] *See also* Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASHINGTON UNIV. L. QUARTERLY 919 (2004); Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222 (2003); Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Though a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153 (1996); Roman P. Storzer and Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 941 (2001).

in a society that wishes to acknowledge and encourage a diverse and pluralistic populous. The solution to Establishment Clause concerns is not the censorship of religious recognition, but the encouragement of more diverse religious expression. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 193 (1992) ("If members of minority religions (or other cultural groups) feel excluded by government symbols or speech, the best solution is to request fair treatment of alternative traditions, rather than censorship of more mainstream symbols.").[3]

A. *The* Lemon *test does not reflect the protective meaning and understanding of the Establishment Clause.*

The *Lemon* test has been roundly criticized by Supreme Court Justices, Courts of Appeals, and scholars. *See, e.g.*, *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 132 S. Ct. 12, 12–23 (2011) (Thomas, J., dissenting); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the

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[3] Indeed, this approach has been adopted with great success at Arlington National Cemetery, where the National Cemetery Administration of the Department of Veterans Affairs provides 71 different types of permanent headstones to accommodate many religious traditions, including Muslim, Sikh, Baha'i, and Buddhist faiths. *See* U.S. Dept. of Veterans Affairs, *Available Emblems of Belief for Placement on Government Headstones and Markers*, National Cemetery Administration, http://www.cem.va.gov/hmm/emblems.asp (last visited July 20, 2018).

little children and school attorneys of Center Moriches Union Free School District."); *Van Orden* v. *Perry*, 545 U.S. 677, 686 (2005) (plurality) (relegating the *Lemon* factors to "no more than helpful signposts"); *Green* v. *Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1245 (10th Cir. 2009) (Gorsuch, J., dissenting) (noting circuit split regarding whether *Lemon* controls Establishment Clause analysis of public displays, and characterizing the state of the law as "'Establishment Clause purgatory'") (citation omitted); *Doe ex rel. Doe* v. *Elmbrook Sch. Dist.*, 687 F.3d 840, 869 (7th Cir. 2012) (Easterbrook, J., dissenting) (noting the test was "made up by the Justices" and lacked "any historical provenance"); Eric Rassbach, *Town of Greece* v. *Galloway: The Establishment Clause and the Rediscovery of History*, 2014 CATO S. CT. REV. 71, 91 (2014).

As these well-founded criticisms mounted, this Court has slowly retreated from reliance on the *Lemon* test. Indeed, this Court has not applied the *Lemon* factors to the merits of an Establishment Clause claim since 2005. *See Town of Greece* v. *Galloway*, 134 S. Ct. at 1819 (declining to apply *Lemon* and instead stating "the Establishment Clause *must* be interpreted by reference to historical practices and under-standings") (emphasis added; quotation omitted); *Hosanna-Tabor*, 565 U.S. 171 (ignoring *Lemon*); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (same); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (same).

The gradual abandonment of *Lemon* rests on good reason, namely that the test, however well-intentioned, is an utter departure from the historic understanding and interpretation of the Establishment Clause. In *Lemon* v. *Kurtzman*, the Court self-

consciously abandoned traditional historical interpretation, complaining that it could "only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." 403 U.S. at 612. The Court then looked to only the preceding two decades of its own Establishment Clause decisions to "glean[]" its ahistorical three-prong test. *Id.* *Lemon's* approach and test have proven unworkable and were squarely rejected by this Court in *Town of Greece*, which restored the role of historical practice to the center of Establishment Clause analysis, ruling that "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers." 134 S. Ct. at 1819; *see also id.* ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.").

As this Court has previously held, and as Judge Gregory correctly noted in his dissenting opinion below, the Establishment Clause "does not require the government 'to purge from the public sphere' any reference to religion," and "[s]uch absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." Pet. App. 35a (quoting *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring) (plurality opinion)). In short, the test proposed by *Lemon* and applied by the Fourth Circuit in the instant appeal is unworkable as it leads inexorably to the situation *Van Orden* warned against—a situation the Framers and ratifiers never envisioned or intended.

B. The Lemon *test has an especially pernicious and disproportionate effect on minority religions by effectively excluding them from public speech and grounds entirely.*

In addition to, and perhaps as a result of, its historic and analytical infirmities noted by courts and scholars, the *Lemon* test has a particularly perverse effect on minority religious groups. The effect of *Lemon*, of course, is to exclude all religious depictions and observance from State speech and grounds unless those depictions and observances have been so secularized as to be stripped of meaningful religious significance. That exclusion, however, is more complete on minority religious groups because they are not part of the entrenched "civil religion" of American public life and, therefore, their display is inherently imbued with specifically religious significance. *See, e.g.*, *Lynch* v. *Donnelly*, 465 U.S. 668, 675–76 (1984) (noting *Lemon* tolerates only *de minimis* vestiges of the Christian faith such as observance of the Thanksgiving and Christmas holidays); *see also* Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASHINGTON UNIV. L. QUARTERLY 919 (2004) (noting that although military uniform requirements are facially-neutral, observant Jews and other religious minorities are "disproportionately harmed" by them because the use of headgear or other religious garb is a religious duty for them and not for most Christian groups). This is completely antithetical to the original understanding of the Establishment Clause and disestablishment generally, which, as noted above, was to offer special solicitude to minority religions. *See* Part I.A, *supra*.

For example, in *Town of Greece*, the plaintiffs advocated for a *Lemon*-based prayer standard that

would *necessarily* exclude most minority religions. *See* Merits Brief of Respondent in *Town of Greece* at 53 ("Where government-sponsored prayer is permitted, a prayer to God is plainly more inclusive than one to 'Jesus' or 'Allah'" and "'a prayer which uses ideas or images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral.'") (quoting *Lee*, 505 U.S. at 588).[4] This Court correctly rejected that approach, choosing instead to apply a historical approach that correctly interprets and applies the meaning of the Establishment Clause and which also allows space for authentic religious diversity in public invocations.

Stated simply, the effect of the *Lemon* test is that minority religious groups are excluded entirely from official recognition and depictions. This effect cannot be squared with the text, original understanding, or historic interpretation of the Establishment Clause. This Court should grant the Petitions and inter *Lemon* once and for all.

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[4] Counsel for the plaintiffs in *Town of Greece* conceded at oral argument that the application of the *Lemon* test they sought to impose would only cater to "the vast majority" and would exclude many different types of minorities and would require the government to exclude religious leaders who believe they must pray to their God in His specific name. *See* Transcript of Oral Argument, November 6, 2013, *Town of Greece v. Galloway*, 46–50, available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2013/12-696_3jqa.pdf.

C. *In contrast to the unworkable and ahistorical* Lemon *test, the test suggested by* Van Orden *(and urged by Petitioners) is historically defensible, clearer in its application, and thus more consistent in its results.*

In contrast to the historical and analytical deficiencies of the *Lemon* test (and the resulting morass of inconsistent rulings by the lower courts), the test discernible in *Van Orden* and proposed by Petitioners is at once historically justifiable and an eminently workable formulation to guide the lower courts. *See* Pet. for Cert. of the Am. Legion at 34–35 (urging this Court to "articulate a simple rule for constitutional challenges to passive displays: when a government uses religious imagery in a way that is consistent with 'the rich American tradition of religious acknowledgments,' [] the display will be presumptively valid unless it is shown that the government was not reflecting this tradition but was exploiting it to coerce or convert nonadherents.") (quoting *Van Orden*, 545 U.S. at 690 (plurality opinion)).

In addition to Petitioner's arguments urging the adoption of this eminently reasonable test, *amicus curiae* proffer two additional reasons of significance to minority faith groups. First, such a test (in contrast to *Lemon*) would permit a more accurate public depiction of the broad array of beliefs and faith groups that have made up the rich pluralistic tapestry of America's citizenry from the Founding to the present day. Under such a test, the displays and expressions of minority faiths—which, as noted above, are inevitably perceived as inherently religious and thus *verboten* under *Lemon*—would receive equal treatment and accommodation as the

vestiges of Christianity that are tolerated under *Lemon*.

Second, such a test serves as a powerful prophylactic against religious bias and persecution. In the words of future Supreme Court Justice James Iredell to the North Carolina ratifying convention, the Constitution's Religion Clauses were "calculated to secure universal religious liberty, by putting all sects on a level—the only way to prevent persecution." *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, Washington*, vol. IV at 194 (Jonathan Elliot, ed. 1836). Likewise, this test too would level the playing field and prevent the exclusion of minority religious expression that occurs under the current doctrinal regime.

In sum, the test Petitioners urge this Court to adopt is not only historically defensible and practically workable, but it also effectuates the constitutional ideal of giving minority religious groups full and equal standing not only by accommodating their private beliefs and observances but also in the State's recognition and acknowledgement of their presence, role, and participation in our communities and democracy.

III. Offended observer standing and the resulting "heckler's veto" it permits have a particularly injurious effect on minority religious communities.

Though not a focus of the Petitions for Certiorari, the Fourth Circuit's reliance on the doctrine of "offended observer" standing, *see* Pet. App. 10a–11a, provides yet another reason to grant the Petitions and close this doctrinal loophole that

allows anti-religious hecklers to shout down religious speech in the public square.

Among its other shortcomings, offended observer standing has a disproportionate impact on minority religions. By definition, such religions are either unfamiliar or disagreeable to the majority of the population. *See Spencer* v. *World Vision, Inc.*, 633 F.3d 723, 745 (9th Cir. 2011) (Kleinfeld, J., concurring) (explaining how religious activities from a variety of faiths can be misperceived by outsiders); *see also* Roman P. Storzer and Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 Geo. Mason L. Rev. 929, 941 (2001) ("Minority religions may have practices viewed as unfamiliar or distasteful by the general public.") (citations omitted); Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1187 (2005) (noting the inclination "to find 'good cause' in familiar religions and 'fault' in unfamiliar or minority faiths"); J. David Cassel, *Defending the Cannibals*, 57 CHRISTIAN HISTORY & BIOGRAPHY 12 (1998) (noting that in the early centuries A.D., the ruling Roman upper-class believed that the tiny early Christian church was home to "cannibalistic, incestuous ass-worship").

In keeping with this general rule, the average American is more likely to be put off or upset when encountering Islam than when encountering Christianity. For instance, a public invocation addressing "Allah" is more likely to offend or divide than an invocation addressed to "God." *See Pelphrey* v. *Cobb Cnty., Ga.*, 547 F.3d 1263, 1272 (11th Cir.

2008) (noting one of the plaintiffs who challenged a local legislative prayer practice "testified that a prohibition of 'sectarian' references would preclude the use of 'father,' 'Allah,' and 'Zoraster' but would allow 'God' and 'Jehovah'"). Indeed, when the Islamic Center of Murfreesboro Tennessee began building a new mosque to accommodate its growing congregation, its efforts were met with hostile protests from a small group of local residents culminating in acts of vandalism, arson, and even a bomb threat, which resulted in a federal indictment. *See* MSMV-TV, *Islamic Center of Murfreesboro Receives 9/11-related threat* (Sept. 6, 2011), available at http://www.wsmv.com/story/15404274/islamic-center-of-murfreesboro-receives-threat.[5]

Similar examples of unfounded "offense" at exposure to minority religions such as Islam abound. A Virginia county, for example, was forced to close its public schools following an influx of threats against a teacher and the school due to a lesson in which she

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[5] Similar animus born of ignorance is directed at other minority religious groups. For example, several municipalities in New York were incorporated out of sheer "animosity toward Orthodox Jews as a group." *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 431 (2d Cir. 1995) (quoting leader of the incorporation movement as stating "the reason [for] forming this village is to keep people like you [i.e., Orthodox Jews] out of this neighborhood"); *see also Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 153 (3d Cir. 2002), cert. denied, 539 U.S. 942 (2003) (noting the Borough had refused to allow demarcation of an eruv on telephone poles after Tenafly residents "expressed vehement objections prompted by their fear that an eruv would encourage Orthodox Jews to move to Tenafly," "that the Orthodoxy would take over," and that "Jews might stone [] cars that drive down the streets on the Sabbath") (citations and quotation marks omitted) (alteration in original).

asked students to try writing in Arabic calligraphy. *See* Moriah Balingit, *Schoolwork about Islam triggers backlash in Virginia County*, Dec. 18, 2015, available at https://www.washingtonpost.com/news/education/wp/2015/12/17/furor-over-arabic-assignment-leads-virginia-school-district-to-close-friday/?utm_term=.a767a410c2fe.

Accordingly, minority or disfavored religious groups are particularly susceptible to suits asserted by offended observers who seek to silence religious speech. This "heckler's veto" is "one of the most persistent and insidious threats to first amendment rights." *Berger* v. *Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985). Allowing citizens standing in federal court solely to complain about *religious* offensive speech "effectively empower[s] a majority to silence dissidents simply as a matter of personal predilections." *Cohen* v. *California*, 403 U.S. 15, 21 (1971); *see also Snyder* v. *Phelps*, 562 U.S. 443, 448 (2011) (protecting grossly offensive speech from attempts by citizens to employ governmental power to punish the speech). Indeed, targeting religious speech just because of its religious nature is a "blatant" form of unconstitutional discrimination. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995). Hence this Court's longstanding precedent against "a modified heckler's veto" which sought to ban a group's religious activity on the basis of what others might perceive. *Good News Club* v. *Milford Central Sch.*, 533 U.S. 98, 119 (2001). More broadly, the Constitution rejects the notion that "adult citizens" are undone by mere exposure to religious expression. *Town of Greece*, 134 S. Ct. at 1823 (noting that "adult citizens" are presumed by law to be "firm in their own beliefs" and

able to tolerate exposure to others' expression of faith). Offended observer standing is akin to, but *worse* than, the heckler's veto:

> In the case of the heckler's veto, the state's decision to censor expression is not intended to suppress speech or to appease hecklers, but rather to serve a strong interest in protecting public safety from a potentially violent demonstration. However, in cases concerning offended observers, the government curtails speech not to protect public safety, but merely to appease the sensibilities of those who have decided to seek to censor an unwanted display rather than to avert their eyes.

Richard F. Duncan, *Just Another Brick in the Wall: The Establishment Clause As A Heckler's Veto*, 18 TEX. REV. L. & POL. 255, 265–66 (2014). This Court should close the ahistorical loophole that empowers anti-religious hecklers to drag religious expression into court and chill religious speech in the public square.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests this Court grant the Petitions for Certiorari and bring needed clarity and historical consistency to Establishment Clause jurisprudence.

Miles E. Coleman, *Counsel of Record*
NELSON MULLINS RILEY & SCARBOROUGH, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201
miles.coleman@nelsonmullins.com
(803) 799-2000

Counsel for *Amicus Curiae*

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